

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Appl. No : 09/780,273
Applicant : Froseth et al.
Filed : February 9, 2001
**Title : Customized Food Selection, Ordering
and Distribution System and Method**

TC/A.U. : 1794
Examiner : Thakur

Docket No. : 5390USA

APPLICANT'S APPEAL BRIEF

Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Dear Sir:

The Applicants of the above-identified U.S. patent application submit this Appeal Brief in response to the Office Action dated April 14, 2008 and in support of an appeal from the rejection of claims 128, 134, 135, 137-139 and 144-146 in this application.

TABLE OF CONTENTS

- I. REAL PARTY IN INTEREST
- II. RELATED APPEALS AND INTERFERENCES
- III. STATUS OF CLAIMS
- IV. STATUS OF AMENDMENTS
- V. SUMMARY OF CLAIMED SUBJECT MATTER
- VI. GROUNDS OF REJECTION TO BE REVIEWED IN APPEAL

A. Whether claims 128, 134 and 144 are properly rejected under 35 U.S.C. § 103(a) as being unpatentable over Great Britain Patent No. 2,250,266 to Ezzat in view of U.S. Patent No. 3,851,574 to Katz et al., GoogleGroups (12/8/1999), Daenkindt et al. (EP 335852), U.S. Patent No. 4,751,090 to Belleson et al., GoogleGroups (6/16/1999), GoogleGroups (1/21/2000), GoogleGroups (1/22/2000), GoogleGroups (1/19/2001), International Food Information Council (IFIC – 1998), U.S. Patent No. 6,618,062 to Brown et al. and U.S. Patent No. 6,358,546 to Bebiak et al.

B. Whether claims 135, 138, 145 and 146 are properly rejected under 35 U.S.C. § 103(a) as being unpatentable over Ezzat in view of Katz, GoogleGroups (12/8/1999), Daenkindt et al., Belleson et al., GoogleGroups (6/16/1999), GoogleGroups (1/21/2000), GoogleGroups (1/22/2000), GoogleGroups (1/19/2001), and International Food Information Council (IFIC – 1998).

VII. ARGUMENTS

A. Whether claims 128, 134 and 144 are properly rejected under 35 U.S.C. § 103(a) as being unpatentable over Great Britain Patent No. 2,250,266 to Ezzat in view of U.S. Patent No. 3,851,574 to Katz, GoogleGroups (12/8/1999), Daenkindt et al. (EP 335852), U.S. Patent No. 4,751,090 to Belleson et al., GoogleGroups (6/16/1999), GoogleGroups (1/21/2000), GoogleGroups (1/22/2000), GoogleGroups (1/19/2001), International Food Information Council (IFIC – 1998), U.S. Patent No. 6,618,062 to Brown et al. and U.S. Patent No. 6,358,546 to Bebiak et al.

- 1) Claims 128 and 144
- 2) Claim 134

B. Whether claims 135, 138, 145 and 146 are properly rejected under 35 U.S.C. § 103(a) as being unpatentable over Ezzat in view of Katz, GoogleGroups (12/8/1999), Daenkindt et al., Belleson et al., GoogleGroups (6/16/1999), GoogleGroups (1/21/2000), GoogleGroups (1/22/2000), GoogleGroups (1/19/2001), and International Food Information Council (IFIC – 1998).

- 1) Claims 135 and 145
- 2) Claim 137
- 3) Claims 138 and 146
- 40 Claim 139

VIII. CLAIMS APPENDIX

IX. EVIDENCE APPENDIX

X. RELATED PROCEEDINGS APPENDIX

I. REAL PARTY OF INTEREST

The above-identified patent application has been assigned to General Mills which assignment was recorded under Reel No. 011961, Frame 0279.

II. RELATED APPEALS AND INTERFERENCES

There does not exist any known related appeals or interferences that would directly affect, be directly affected by or have a bearing on the decision in this case.

III. STATUS OF CLAIMS

Claims 128, 134, 135, 137-139 and 144-146 stand rejected and are herewith appealed.

IV. STATUS OF AMENDMENTS

No amendments of the claims have been made to the application since October 9, 2007 and certainly not after the rejection dated April 14, 2008 from which this appeal is taken.

V. SUMMARY OF THE CLAIMED SUBJECT MATTER

The present invention, as covered by claims 128, 134 and 144 is directed to a customized food product. As set forth in **claim 128**, the customized food product includes at least one consumer selected food ingredient, at least one a consumer selected

additive and a customer selected package in which the selected food ingredient and additive are placed. Figure 1 sets forth a simplified diagram of a customized selecting, ordering and distribution system 100 for a particular type of food produce, i.e., cereal. However, the system 100 can be used for virtually any type of food product. See page 17, lines 23-25. As set forth in lines 5-10 on page 3 of the specification, a consumer can select from a list, the list having choices selected from the group consisting of customized food ingredient choices, customized food product choices and customized food category choices. See, for example, Figures 10A, 10B and 10C. The resultant product can be shipped to an end user. See page 4, lines 18-19. The term "customized food product" is defined as a food product that contains any type of customized food ingredients, such as a cereal base, together with selected additives. See page 12, lines 5-8. An "additive" is defined as any type of food ingredient added to the food product at any time during manufacturing. The term "ingredient" as defined on page 9, lines 9-10 is the smallest, non-divisible part of a cereal or other food product. See also page 78, lines 13-14, noting that customized packaging options can be offered. See Figure 1 detailing a customized selecting, ordering and distribution system 100 having a custom finishing facility 108 which can be designed to handle a variety of different foods and food combinations, including snacks. See also page 19, lines 12-15. The customized facility 108 can have a modified packaging line and involve sequential addition of desired components into individual servings until the product is complete, at which point the serving is packaged and shipped, as shown in Figure 1 and set forth on page 20, lines 17-20. The customized food product includes sucralose. See page 21, lines 3-4, stating that the type of sweetener 130 can be varied to include sucralose. A microwave package must also be selected. In particular, see page 78, lines 13-19 which states that "customized packaging options can also be offered. For example, as shown in FIG. 23A, a single-serving pouch package 2302 can be used. Alternatively a covered bowl single serving package 2304 can be used as shown in FIG. 23B. Alternatively, a box 2306 type of packaging can be used as shown in FIG. 23C. In another embodiment, not shown, a beverage-type of package is used. In one embodiment, the package contains a single serving. In another embodiment, the package is a consumer-sized box containing more than one serving." Additionally, the

customized food product requires popping the food product in a microwave. Note, page 79, lines 19-21 discloses that a consumer can further "finish" the food product, such as by cooking, baking, grilling, heating, puffing, popping, etc., or through the use of thermal or microwave energy as set forth on page 15, line 20.

Regardless of the broad disclosure on a customized food product, **claim 128** is actually limited to a preferred embodiment wherein the food product is customized by the consumer selecting: popcorn (page 12, lines 13-14), a flavoring (page 8, lines 16-29), an additive constituted by sucralose (page 21, lines 3-4), and a microwave package (see page 78, lines 13-19). The claim specifies that the popcorn, flavoring and sucralose are all in the microwave package and the food product must be finished by the consumer by microwave popping the popcorn and heating the sucralose in the package.

As set forth in **claim 134**, the customized food product may also include acesulfame K. See page 8, lines 24-26, noting that additives include non-nutritive (non-carbohydrate) high-potency sweeteners (such as aspartame, acesulfame K, and saccharin).

Claim set 135 and 137 is limited to a preferred popcorn snack comprising popcorn, sucralose and a package containing both the popcorn and sucralose. Specifically, **claim 135** requires that a popcorn snack include unpopped popcorn, sucralose and a microwave package containing the unpopped popcorn and sucralose, wherein the popcorn can be popped and the sucralose heated within the package through the use of microwaves. As set forth on page 12, lines 13-14, the food product can have an ingredient constituting popcorn. Also see page 21, lines 3-4, stating that the type of sweetener 130 can be varied to include sucralose. Further, note page 79, lines 19-21 which discloses that a consumer can further "finish" the food product, such as by cooking, baking, grilling, heating, puffing, popping, etc., or through the use of thermal or microwave energy as set forth on page 15, line 20.

Claim 137 requires that the snack further includes acesulfame K. As set forth on page 12, lines 13-14, the customized food product can be popcorn; while the additive can constitute a sweetener, which may be acesulfame K and/or sucralose as set forth on page 21, lines 3-4.

Claims 138, 139 and 146 cover a method for preparing a food product by adding sucralose to unpopped popcorn, packaging the popcorn and sucralose for distribution and requiring that the food product be finished by the consumer by popping the popcorn in a microwave while heating the sucralose. Specifically, **claim 138** requires a method comprising adding sucralose to unpopped popcorn and packaging the popcorn and sucralose for distribution. Again, as set forth on page 12, lines 13-14, the food product can constitute popcorn snacks, while the additive can constitute a sweetener, which may be acesulfame K and/or sucralose as set forth on page 21, lines 3-4. Note that the consumer can further "finish" the food product, such as by cooking, baking, grilling, heating, puffing, popping, etc., as set forth on page 79, lines 19-21, or through the use of thermal or microwave energy as set forth on page 15, line 20.

Claim 139 requires that acesulfame K be added to the packaging. As set forth on page 12, lines 13-14, the customized food product can be any type of snack including popcorn snacks; while the additive can constitute a sweetener, which may be acesulfame K and/or sucralose as set forth on page 21, lines 3-4.

VI. GROUND OF REJECTION TO BE REVIEWED ON APPEAL

A. Whether claims 128, 134 and 144 are properly rejected under 35 U.S.C. § 103(a) as being unpatentable over Great Britain Patent No. 2,250,266 to Ezzat in view of U.S. Patent No. 3,851,574 to Katz et al., GoogleGroups (12/8/1999), Daenkindt et al. (EP 335852), U.S. Patent No. 4,751,090 to Belleson et al., GoogleGroups (6/16/1999), GoogleGroups (1/21/2000), GoogleGroups (1/22/2000), GoogleGroups (1/19/2001),

International Food Information Council (IFIC – 1998), U.S. Patent No. 6,618,062 to Brown et al. and U.S. Patent No. 6,358,546 to Bebiak et al.

B. Whether claims 135, 138, 145 and 146 are properly rejected under 35 U.S.C. § 103(a) as being unpatentable over Ezzat in view of Katz, GoogleGroups (12/8/1999), Daenkindt et al., Belleson et al., GoogleGroups (6/16/1999), GoogleGroups (1/21/2000), GoogleGroups (1/22/2000), GoogleGroups (1/19/2001), and International Food Information Council (IFIC – 1998).

VII. ARGUMENTS

Applicants respectfully submit that claims 128, 134, 135, 137-139 and 144-146 are patentable and nonobvious over the cited references. As will be explained below, a prima facie case of obviousness has not been established for any of claims 128, 134, 135, 137-139 and 144-146 because: (1) the asserted reference combination fails to teach all claimed limitations and/or limitations have not been addressed; (2) there is no apparent reason to combine the prior art in the manner suggested by the Examiner; (3) there is no reasonable expectation of success for the proposed modification; and/or (4) even if the prior art was combined, the combination would still not suggest the claimed invention.

A. Whether claims 128, 134 and 144 are properly rejected under 35 U.S.C. § 103(a) as being unpatentable over Great Britain Patent No. 2,250,266 to Ezzat in view of U.S. Patent No. 3,851,574 to Katz, GoogleGroups (12/8/1999), Daenkindt et al. (EP 335852), U.S. Patent No. 4,751,090 to Belleson et al., GoogleGroups (6/16/1999), GoogleGroups (1/21/2000), GoogleGroups (1/22/2000), GoogleGroups (1/19/2001), International Food Information Council (IFIC – 1998), U.S. Patent No. 6,618,062 to Brown et al. and U.S. Patent No. 6,358,546 to Bebiak et al.

1. Claims 128 and 144

In rejecting claim 128 and dependent claim 144, the Examiner has failed to establish a *prima facie* case of obviousness. In order to establish a *prima facie* case of obviousness, each and every limitation of the claims must be met. See M.P.E.P. § 2143 (citing *In re Vaeck*, 947 F.2d 488, 20 USPQ 2d 1438 (Fed. Cir. 1991)). There must be an apparent reason for one of ordinary skill in the art to combine known elements in the fashion claimed by the patent at issue. This analysis should be made explicit. See *KSR International Co. v. Teleflex Inc.*, 127 U.S. 1727, 1732 (2007), citing *In re Kahn*, 441 F. 3d 977, 988 (CA Fed. 2006).

Initially, it is noted that the Examiner references twelve prior art documents in rejecting claim 128. Claim 128 requires, among other limitations, sucralose and unpopped popcorn in a microwave package. Importantly, sugar substitutes, such as sucralose, are chemically distinct from natural sugars, and many such sweeteners cannot be utilized in the same manner as sugar. This is particularly significant when the cooking method utilized is microwave heating. Unlike conventional cooking, such as a baking operation which utilizes conduction principles, microwave heating involves the application of wavelength energy to excite molecular bonds and thus heat food. The effect of microwaves on food additives can be vastly different than the effect of a conventional cooking method on the same additives. For example, aspartame is thermally unstable under microwave conditions and is unsuitable as a sugar substitute in microwave cooking.

The main reference cited by the Examiner, Ezzat, does not teach or suggest a customized food product including a flavoring selected by a consumer, a package selected by a consumer, or sucralose as a sweetening agent. At best, Ezzat is representative of off-the-shelf microwave popcorn including popcorn, salt, butter and sugar in a bag. The Examiner turns to Katz et al., which is directed to a coating system for popcorn including sucrose and corn syrup. The coating forms a glassy film or glaze

over the kernels. Katz et al. notes that sucrose alone does not serve the purpose of the coating, and states that other carbohydrates can be used. Katz et al. fails to teach a customizing food product including a flavouring selected by a consumer, a package selected by a consumer, or sucralose as a sweetening agent. At most, Katz et al. teaches that a particular carbohydrate coating for popcorn can include various carbohydrates. However, Katz et al. does not teach or suggest the use of sugar substitutes for microwave popcorn, or even just sugar substitutes. In fact, Katz is particularly limited to the use of sucralose or dextrose syrups (see column 3, lines 23-35). It is respectfully submitted to be totally misleading on the part of the Examiner to state that Katz broadly teaches using alternative sweeteners with sucrose on unpopped popcorn when the Katz disclosure is specifically limited to sucrose and dextrose.

On page 7 of the Office Action, the Examiner notes that the IFIC reference teaches that sucralose can be utilized in cooking. Again, this is quite misleading. The IFIC reference does not reference microwave cooking, which is significantly different from conventional cooking techniques, such as baking which is the type of cooking specifically discussed in IFIC.

More important in connection with the combination presented, the Examiner cites the GoogleGroups (12/8/1999) and broadens this disclosure in stating that the reference "teaches that sucralose has been a known sweetener used to flavor popcorn." However, GoogleGroups (12/8/1999) is actually, specifically limited to suggesting the sprinkling of Splenda ® (sucralose) on **previously popped** popcorn instead of Sugar Twin ®. At best, this combination would suggest sprinkling sucralose onto the popcorn of Ezzat in view of Katz et al. **after** the popcorn is cooked. In contrast, claim 128 requires the sucralose to be pre-packaged with the popcorn which still needs to be popped. There is simply no teaching provided by Ezzat, Katz et al., GoogleGroups (12/8/1999) and/or the IFIC reference to utilize Splenda ® in a packaged, uncooked or unpopped popcorn product. The Examiner appears to be arguing that sucralose and sugar are equivalents. This is simply not the case. Sugar and sugar substitutes have different chemical structures and

can react in vastly differently ways when processed, consumed and/or heated. This fact is actually evidenced by GoogleGroups (1/21/2000) which clearly states that Splenda ® is not a direct substitute for sugar and "Splenda doesn't remotely resemble sugar in structure." Therefore, not only is there certainly no suggestion in Ezzat as to the desirability of using a sugar substitute for any purpose and the GoogleGroups (12/8/1999) reference is actually seen to teach away from applying sucralose to popcorn prior to popping of the popcorn, GoogleGroups (1/21/2000) evidences that sucralose is not a direct substitute for sugar.

On page 4 of the Office Action, the Examiner notes that GoogleGroups (12/8/1999) teaches alternative sweeteners used for dietary purposes, and that Daenkindt et al. teaches that sucralose is a known sweetener. The Examiner goes on to state that Daenkindt et al., GoogleGroups (12/8/1999) and Katz et al. therefore teach that it has been well known to combine alternative sweeteners for the purpose of flavoring popcorn products. This greatly overstates the teachings of the prior art. At most, Daenkindt et al. teaches a sucralose based sweetener, GoogleGroups (12/8/1999) teaches that sucralose can be utilized as a seasoning after cooking, and Katz et al. teaches that carbohydrates have been utilized in microwave popcorn. The Applicant does not argue that sucralose is new. Instead, the Applicant asserts that utilizing sucralose in an unpopped microwave popcorn product in accordance with the present invention is non-obvious.

The Examiner also refers to Belleson et al., which is directed to a glazed microwave popcorn product employing a blend of sucrose and corn syrup. Bellson et al. notes that if the temperature of the sugar based glaze climbs too high, then the glaze will caramelize and darken significantly in a very short period of time. The invention aims to preclude caramelization, as well as burning of the sugar. See paragraph 3, lines 51-55. The Examiner then turns to GoogleGroups (6/16/1999), GoogleGroups (1/21/2000), GoogleGroups (1/22/2000) and GoogleGroups (1/19/2001). In general, the comments by consumers in these GoogleGroups references are complaints regarding the inability of sucralose (i.e. Splenda ®) to caramelize the same way sugar does during baking or candy

making. The Examiner then suggest that, because sucralose does not caramelize like conventional sugar, the burning taste of microwave popcorn (not disclosed by any reference) is thus overcome and there would have been an expectation of success when using sucralose in packaged unpopped microwave popcorn kernels. However, the referenced prior art actually reaffirms that sucralose is chemically distinct from sugar and does not react the same way sugar does. Again, GoogleGroups (1/21/2000) notes the "Splenda ® (sucralose) doesn't remotely resemble sugar in structure." The fact that sucralose does not caramelize when desired during candy making or baking does not lead one to the conclusion that sucralose would be a desirable replacement for sugar in microwave popcorn products. GoogleGroups (6/16/1999) and (1/22/2000) are only concerned with employing Splenda ® when baking apple, pecan and pumpkin pies, thereby lacking any teaching regarding microwave cooking, let alone microwave popcorn. GoogleGroups (1/19/2001) also only discusses baking with Splenda ® and using Splenda ® in hot drinks. Again, this reference specifically states that Splenda ® does not replace sugar's chemical properties in most baking. From the last appeal taken in this case to the present appeal, the Examiner has attempted to supplement the GoogleGroups (12/8/1999) with the other cited GoogleGroups. However, providing the additional GoogleGroup references to the use of Splenda ® in baking products or hot drinks, coupled with a) no reference to any microwave product, let alone microwave popcorn b) specific statements to the distinct chemical properties between Splenda ® and sugar and c) complaints leading one away from employing Splenda ® are seen to actually support the arguments of distinctions made by the Applicant rather than supporting the positions taken by the Examiner during this prolonged prosecution.

A proper rejection under 35 U.S.C. § 103 cannot be based on hindsight knowledge of the invention under consideration for the sole basis of attempting to meet the recitation of the claims. Specifically, the CAFC in *Environmental Designs, Ltd. v. Union Oil Co. of Cal.*, 218 USPQ 865, 870 (1983) stated:

All the pieces of the present invention were known in the art, ...That all elements of an invention may have been old (the normal situation), or some old and some new, or all new, is, however, simply irrelevant. Virtually all inventions are combinations and virtually all are combinations of old elements. A court must consider what the prior art as a whole would have suggested to one skilled in the art (Case citations).

On page 7 of the Office Action, the Examiner states that "claim 128 only recites wherein the food ingredient, the flavouring and the additive are selected by the consumer." Actually, claim 128 also requires "a microwave package, selected by the consumer." This limitation is clearly supported by the specification. For example, see page 78, lines 13-19 of the application which states that:

"customized packaging options can also be offered. For example, as shown in FIG. 23A, a single-serving pouch package 2302 can be used. Alternatively a covered bowl single serving package 2304 can be used as shown in FIG. 23B. Alternatively, a box 2306 type of packaging can be used as shown in FIG. 23C. In another embodiment, not shown, a beverage-type of package is used. In one embodiment, the package contains a single serving. In another embodiment, the package is a consumer-sized box containing more than one serving."

Ezzat discusses a sealed bag containing corn kernels and spices which are popped to form classic popcorn. On page 5 of the Office Action, the Examiner asserts that the product in Ezzat is customized simply because "the prior art is marketing as packaged flavored unpopped popcorn kernels, by selecting a particular brand or a particular flavor or selecting a packaged product with the particular desired ingredients, the consumer is selecting a customized food product." This interpretation ignores the plain meaning of the claims, particularly when they are properly read in light of the specification. See page 3 of the Final Office Action. There is simply no teaching or suggestion in Ezzat, either taken alone or in combination, for a consumer to establish a customized food product by choosing popcorn as a food ingredient, a flavoring, sucralose as an additive

and a microwave package, when the popcorn must be popped with microwaves while the sucralose is heated as required by claims 128 and 144.

The M.P.E.P. clearly outlines examination guidelines including the court reminded instruction of: "The goal is to answer the question 'What did applicants invent?'" See *In re Abele*, 684 F.2d 902, 907, 214 USPQ 682, 687 (Fed. Cir. 1992) and M.P.E.P. § 2106. M.P.E.P. § 2106 goes on to require the Examiner to "evaluate each claim limitation..." and to "correlate each claim limitation to all portions of the disclosure that describe the claim limitation..." The "claim as a whole must be considered" and "when evaluating the scope of a claim, every limitation in the claim must be considered. In the present case, the applied prior art has absolutely no disclosure of any analogous customized food arrangement. In particular, Ezzat is specifically concerned with preparing a predetermined, pre-packaged food product which a consumer would have to directly select off a supermarket shelf or the like. The consumer only determines whether to buy the product, but has no direct input on the contents of the main ingredient, on the decision of the particular flavoring or additive(s) included or on the selection of the package in which the main ingredient, flavoring and additive are placed. Ezzat clearly outlines that the disclosed popcorn package is "marketed in a transparent cover" (see page 2, lines 8+), with the package being microwavable. Clearly the consumer did not have an input into which particular container the ingredients were placed. Instead, the decision is predetermined by the manufacturer.

Regardless, the Examiner turns to Brown et al., which teaches an electronic menu which can be generated depending on a customer's food preferences to enable a customer to select food at a restaurant which meets their preferences. This reference is not considered to be particularly relevant to the present invention, and does not teach or suggest a customizing food product including unpopped popcorn, a flavoring selected by a consumer, a package selected by a consumer or sucralose as a sweetening agent. The Examiner also turns to Bebiak et al., which is directed to a method for customizing pet food. Again, Bebiak et al. does not teach or suggest a customizing food product

including unpopped popcorn, a flavoring selected by a consumer, a package selected by a consumer or sucralose as a sweetening agent.

In summary, the Examiner has not set forth any apparent reason for one of ordinary skill in the art to combine the twelve references cited by the Examiner in a manner which would result in the present invention. In fact, why would one of ordinary skill in the art substitute sucralose for carbohydrates in a microwave popcorn product based on references which do not teach utilizing sucralose in a microwavable product (all references) and teach that sucralose does not have the same properties as sugar (GoogleGroups (6/16/1999), (1/21/2000), (1/22/2000) and (1/19/2001))?

2) Claim 134

Claim 134 depends from claim 128, and further requires that the customized microwave food product include acesulfame K in the package. On page 6 of the Office Action, the Examiner points to Daenkindt et al. for the teaching of a mixture including aspartame, acesulfame-K, sucralose and alitame. The Examiner then states that Daenkindt et al. teaches that it is conventional to combine sucralose and acesulfame K. However, Daenkindt et al. simply teaches a powder including a plurality of sweeteners, including aspartame, which, as the Applicant has already pointed out and the Examiner not disputed, has been found to be thermally unstable under microwave conditions. Therefore, employing a reference to aspartame, a non-microwave usable sugar substitute, would certainly not provide a reasonable teaching to employ sucralose on a product to be microwaved. Again, the Applicant does not argue that sugar substitutes are new. However, combining sugar substitutes in a microwave popcorn product in the manner claimed certainly is certainly not disclosed or suggested in Daenkindt et al. and is nonobvious.

B. Whether claims 135, 138, 145 and 146 are properly rejected under 35 U.S.C. § 103(a) as being unpatentable over Ezzat in view of Katz, GoogleGroups (12/8/1999), Daenkindt et al., Belleson et al., GoogleGroups (6/16/1999), GoogleGroups (1/21/2000), GoogleGroups (1/22/2000), GoogleGroups (1/19/2001), and International Food Information Council (IFIC – 1998).

i) Claims 135 and 145

The Examiner rejects claims 135 and 145 for the same reasons given with respect to claims 128, 134 and 144 outlined above. However, as these claims do not require the customizing features of claim 128, the Examiner has dropped the Brown and Bebiak et al. references, leaving the 10-way combination as set forth above. To this end, the arguments presented above with respect to this overall combination are equally applicable here. With respect to claims 135 and 145, it is respectfully submitted that the Examiner has failed to provide an apparent reason for one of ordinary skill in the art to combine the references in a way which would result in the claimed invention. Claim 135 requires, among other limitations, sucralose in a microwave popcorn package with unpopped popcorn. As indicated above, considered important in accordance with the present invention is the inclusion of sucralose as a pre-packaged sweetener with the unpopped popcorn. None of the cited references even teach utilizing sucralose in a microwave environment. The main reference, Ezzat, does not disclose the use of sucralose at all. The Examiner then turns to Katz et al., which is directed to a coating system for popcorn including sucrose and corn syrup. Therefore, Katz et al. also fails to teach sucralose as a sweetening agent in a microwave popcorn package.

The Examiner then cites the GoogleGroups (12/8/1999) which suggests sprinkling Splenda ® (sucralose) on **previously popped** popcorn instead of Sugar Twin ®. At best, this combination would suggest sprinkling sucralose onto the popcorn of Ezzat/Katz et al. **after** the popcorn is cooked. There is simply no suggestion in GoogleGroups (12/8/1999)

to utilize Splenda ® in a packaged uncooked popcorn product, let alone an unpopped microwave popcorn product.

On page 4 of the Office Action, the Examiner notes that GoogleGroups (12/8/1999) teaches alternative sweeteners used for dietary purposes, and that Daenkindt et al. teaches that sucralose is a known sweetener. The Examiner goes on to state that Daenkindt et al., GoogleGroups (12/8/1999) and Katz et al. therefore teach that it has been well known to combine alternative sweeteners for the purpose of flavoring popcorn products. Again, this greatly overstates the teaching of the prior art. The Applicant does not argue that sucralose is new. Instead, the Applicant asserts that utilizing sucralose in an unpopped microwave popcorn product in accordance with the present invention is new and nonobvious.

The Examiner also refers to Belleson et al., which aims to preclude caramelization, as well as burning of sugars. See paragraph 3, lines 51-55. The Examiner finally turns to GoogleGroups (6/16/1999), GoogleGroups (1/21/2000), GoogleGroups (1/22/2000) and GoogleGroups (1/19/2001). As stated above, the comments by consumers in GoogleGroups are complaints regarding the inability of sucralose (i.e., Splenda ®) to caramelize the same way sugar does during baking or candy making. The Examiner then suggest that, because sucralose does not caramelize like conventional sugar, the burning taste of microwave popcorn is thus overcome; and there would have been an expectation of success when using sucralose in packaged unpopped microwave popcorn kernels. However, the prior art simply reaffirms that sucralose is chemically distinct from sugar and does not react the same way sugar does. The fact that sucralose does not caramelize when desired during baking or candy making does not lead one to the conclusion that sucralose would be a desirable replacement for sugar in unpopped microwave popcorn products.

Again, the Examiner has not set forth any apparent reason for one of ordinary skill in the art to combine the multiple references cited by the Examiner in a manner which would result in the present invention. Instead, it appears that the Examiner is simply predisposed to reject the claims and, accordingly, has taken unreasonable and overstatingly broad interpretations of the prior art teachings, combined the prior art for reasons not apparent from their actual teachings, and employed impermissible hindsight in rejecting the claims. For at least these reasons, it is respectfully submitted that no proper prima facie case of obviousness has been established.

2) Claim 137

Initially, the Applicant notes that the Examiner failed to properly address claim 137 in the Office Action, i.e., the claim is never listed in any claim rejections. However, for the purposes of this appeal, the Applicant assumes that the Examiner intended to argue claim 137 under this section. Claim 137 depends from claim 135, which is patentably distinct on its own for the reasons argued above. In addition to the limitations in claim 135, claim 137 further requires that the popcorn snack include acesulfame K in the package. On page 6 of the Office Action, the Examiner points to Daenkindt et al. for the teaching of a mixture including aspartame, acesulfame-K, sucralose and alitame. The Examiner then states that Daenkindt et al. teaches that it is conventional to combine sucralose and acesulfame K. However, Daenkindt et al. simply teaches a powder incorporating a plurality of sweeteners, one of which is aspartame that is actually thermally unstable under microwave conditions. Again, the Applicant does not argue that sugar substitutes are new. However, Daenkindt et al. does not at all address employing sucralose in a microwave package. Thus, the Examiner has failed to provide an apparent reason for combining the references in a way that would result in the present invention.

3) Claims 138 and 146

The Examiner rejects claims 138 and 146 for the same reasons set forth above with respect to claims 128, 134 and 144. In rejecting claim 138 and dependent claim 146, the Examiner has failed to establish a prima facie case of obviousness.

Claim 138 is directed to a method of preparing a food product including adding sucralose to unpopped popcorn, packaging the popcorn and sucralose for distribution, and requiring further finishing by a consumer to pop the popcorn by microwave cooking while heating the sucralose. As previously noted, none of the cited references teach utilizing sucralose in a microwave environment. The main reference, Ezzat, does not disclose the use of sucralose at all. The Examiner then turns to Katz et al., which is directed to a coating system for popcorn including sucrose and corn syrup. Katz et al. also fails to teach sucralose as a sweetening agent in a microwave popcorn package.

The Examiner then cites the GoogleGroups (12/8/1999) which suggests sprinkling Splenda ® (sucralose) on previously popped popcorn instead of Sugar Twin ®. At best, this combination would suggest sprinkling sucralose onto the popcorn of Ezzat after the popcorn is cooked. There is simply no motivation provided by GoogleGroups (12/8/1999) to utilize Splenda ® in a packaged uncooked popcorn product.

On page 4 of the Office Action, the Examiner notes that GoogleGroups (12/8/1999) teaches alternative sweeteners used for dietary purposes, and that Daenkindt et al. teaches that sucralose is a known sweetener. The Examiner goes on to state that Daenkindt et al., GoogleGroups (12/8/1999) and Katz et al. therefore teach that it has been well known to combine alternative sweeteners for the purpose of flavoring popcorn products. However, as discussed above, this greatly overstates that teaching of the prior art. Again, the Applicant does not argue that sucralose is new. Instead, the Applicant asserts that utilizing sucralose in an unpopped microwave popcorn product in accordance with the present invention is new and non-obvious.

The Examiner also refers to Belleson et al., which aims to preclude caramelization, as well as burning of sugars. See paragraph 3, lines 51-55. The Examiner then turns to GoogleGroups (6/16/1999), GoogleGroups (1/21/2000), GoogleGroups (1/22/2000) and GoogleGroups (1/19/2001). As stated above, the comments by consumers in GoogleGroups are complaints regarding the inability of sucralose (i.e., Splenda ®) to caramelize the same way sugar does during baking or candy making. The Examiner then suggest that, because sucralose does not caramelize like conventional sugar, the burning taste of microwave popcorn is thus overcome; and there would have been an expectation of success when using sucralose in packaged unpopped microwave popcorn kernels. However, the prior art simply reaffirms that sucralose is chemically distinct from sugar and does not react the same way sugar does. The fact that sucralose does not caramelize when desired during baking or candy making does not lead one to the conclusion that sucralose would be a desirable replacement for sugar in unpopped microwave popcorn products.

Again, the Examiner has not set forth any apparent reason for one of ordinary skill in the art to combine the multiple references cited by the Examiner in a manner which would result in the present invention. Therefore, no prima facie case of obviousness has been established.

4) Claim 139

Claim 139 includes each of the limitations of claim 138 which is patentably distinct on its own for the reasons argued above. In addition to the limitations of claim 138, claim 139 further requires adding acesulfame K to the packaging. As with claim 137, the Examiner failed to properly address the rejection of claim 139 in the Office Action, i.e., the claim is not listed in the rejections made in the body of the Office Action. However, for the purposes of this appeal, the Applicant assumes that the Examiner intended to argue claim 139 under this section. On page 6 of the Office Action, the Examiner points to Daenkindt et al. for the teaching of a mixture including aspartame,

acesulfame-K, sucralose and alitame. The Examiner then states that Daenkindt et al. teaches that it is conventional to combine sucralose and acesulfame K. However, Daenkindt et al. simply teaches a powder including a plurality of sweeteners, one of which is aspartame that is thermally unstable under microwave conditions. Again, the Applicant does not argue that sugar substitutes are new. However, combining sugar substitutes in unpopped microwave popcorn product in the manner claimed is new and nonobvious.

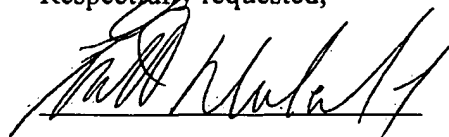
CONCLUSION

It is respectfully submitted that the Examiner has failed to establish a prima facie case of obviousness under 35 U.S.C. § 103 in rejecting claims 128, 134, 135, 137-139 and 144-146. Basically, it is the opinion of the Applicant that none of the prior art, when taken singly or in combination, teaches a packaged food product containing unpopped popcorn applied with sucralose, and that other features of the invention, particularly the consumer customization, the addition of a further sweetener and the subsequent microwave cooking, even further distinguish the invention from the known prior art. It is also not considered unreasonable for the Applicant to request the Examiner, should an Examiner's Answer be prepared, to clarify what the level of ordinary skill in the art is considered to be in connection with making any obviousness-type rejections in this application. In trying to understand the positions taken by the Examiner, it would be particularly beneficial in this case to understand the Examiner's reasoning. For instance, is the Examiner considering one of ordinary skill in the art to be a lab technician of a food company like the present inventors, a homemaker, a chef, a food manufacturer, etc.? With the Examiner holding that one of ordinary skill in the art would be knowledgeable on all the teachings of the twelve references relied upon by the Examiner and would consider combining all these references in the manner proposed by the Examiner, the Examiner should have some predisposed position on this point. In any case, it is

Serial No., 09/780,273
Applicant's Appeal Brief

submitted that the present invention as set forth in this application patentably defines the invention over the known prior art such that the Examiner's rejection should be reversed.

Respectfully requested,

A handwritten signature in black ink, appearing to read "Everett G. Diederiks, Jr.", written over a horizontal line.

Everett G. Diederiks, Jr.
Associate Attorney for Applicant
Reg. No. 33,323

Date: September 12, 2008
DIEDERIKS & WHITELAW, PLC
12471 Dillingham Square, #301
Woodbridge, VA 22192
Tel: (703) 583-8300
Fax: (703) 583-8301

VIII. CLAIMS APPENDIX

128. A customized food product comprising:

- a food ingredient selected by a consumer, said food ingredient being popcorn;
- a flavoring selected by the consumer;
- an additive selected by the consumer, wherein the additive is sucralose; and
- a microwave package, selected by the consumer, containing the food ingredient, the flavoring and the additive, wherein the food product requires further finishing by the consumer in order to pop the popcorn with microwaves and heat the sucralose in the package.

134. The customized food product of claim 128, further comprising: acesulfame K in the package.

135. A popcorn snack comprising:

- unpopped popcorn;
- sucralose; and
- a microwave package containing the unpopped popcorn and the sucralose, wherein the popcorn can be popped and the sucralose heated within the package through the use of microwaves.

137. The popcorn snack of claim 135, further comprising: acesulfame K in the package.

138. A method for preparing a food product comprising:

- adding sucralose to unpopped popcorn;
- packaging the popcorn and sucralose for distribution; and
- requiring the food product to be further finished by a consumer wherein further finishing of the food product by the consumer involves microwave cooking the food product in the packaging in order to pop the popcorn while heating the sucralose.

139. The method of claim 138, further comprising: adding acesulfame K to the packaging.

144. The customized food product of claim 128, wherein the flavoring constitutes salt.

145. The popcorn snack of claim 135, further comprising: salt within the package.

146. The method of claim 138, further comprising: adding salt to the unpopped popcorn prior to packaging for distribution.

IX. EVIDENCE APPENDIX

Not Applicable

X. RELATED PROCEEDING APPENDIX

Not Applicable